

INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), Mirant Kendall, LLC (“Mirant Kendall”), through its undersigned representatives, respectfully submits this petition for review of the final National Pollutant Discharge Elimination System Permit No. MA0004898 (the “NPDES permit”) issued by the United States Environmental Protection Agency, Region 1 (“Region 1”). Filed simultaneously with this petition is a Joint Scheduling Motion submitted by Mirant Kendall and Region 1 seeking additional time for Mirant Kendall to prepare a more substantive petition, and for Region 1 to prepare its response.

Region 1 clearly erred in issuing the NPDES permit because it departed from well-established procedural law governing the permit process. Equally important, the NPDES permit contains numerous terms and provisions based on clearly erroneous conclusions of fact and/or law that Mirant Kendall specifically identified in its public comments, but which Region 1 failed to rationally address. Moreover, the analyses that Region 1 conducted, and which provide the foundation for many of the appealed permit provisions, fails to duly consider the data and public comments submitted by Mirant Kendall or to draw rational conclusions from that data or those comments.

BACKGROUND

Mirant Kendall owns and operates the Kendall Station, an approximately 256-megawatt power plant located in Cambridge, Massachusetts on the Lower Basin of the Charles River. The Kendall Station has existed since the 1950s. Its current NPDES permit was issued in 1988 with a variance under § 316(a) of the Clean Water Act, and has been in effect through the present date. Since that time, Mirant Kendall has also operated pursuant to an identical Surface Water Discharge Permit (“SWDP”) issued by the

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Massachusetts Department of Environmental Protection (“MassDEP”). The current NPDES permit authorizes the discharge of 70 million gallons per day (as a monthly average) of water used for cooling. The discharge temperature is limited to 105° F with a temperature differential of no more than 20° F from the intake temperature.

In February 2001, Mirant Kendall submitted a timely request to Region 1 to modify its existing NPDES permit in several respects. In February 2004, the Assistant Administrator for EPA’s Office of Water signed national technology-based regulations governing cooling water intake structure requirements for power plants like Kendall Station. Those “Phase II” regulations were published in the Federal Register in July 2004, and became effective in September 2004. In June 2004, Region 1 issued a draft NPDES permit. Mirant Kendall submitted extensive public comments on the draft permit by the close of public comments period on October 15, 2004. Mirant Kendall subsequently submitted additional information to Region 1, including but not limited to, the results of on-going biological monitoring of the Charles River from 2004 and 2005 and the results of hydrodynamic and eutrophication modeling of the river and Mirant Kendall’s proposed diffuser using an Region 1-commissioned model that Region 1 released to Mirant Kendall early in 2006.

Throughout the period between issuance of the draft permit in June 2004 and now, Mirant Kendall has repeatedly requested the opportunity to meet with Region 1 to discuss the significant factual, legal, and policy issues that, as Mirant Kendall pointed out in its comments, were raised by the draft NPDES permit. Mirant Kendall believes that such discussions would have allowed the agencies and Mirant Kendall to agree on terms of a renewal permit that would both protect the Charles River and its ecosystem

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consistent with applicable law and allow the Kendall Station to operate with reasonable commercial viability. Instead, the agencies consistently rejected those requests, preferring instead to deliberate without any further input by Mirant Kendall (excepting the additional informational submissions referenced above), even on issues that clearly called for such input.

In late-September 2006, Region 1 issued a final NPDES permit and its response to the public comments. The final NPDES permit, as the response to comments itself states, explicitly depends upon an extensive set of new analyses by the agencies of the 2004 and 2005 biological monitoring data submitted by Mirant Kendall. None of those analyses were made available to Mirant Kendall or the public prior to issuance of the final NPDES permit.

The NPDES permit, which will become effective by its terms on December 1, 2006 (except for the provisions that are stayed by virtue of this appeal), would for the first time impose:

- In-stream temperature limits;
- An extensive temperature, water quality and biological monitoring program, including requirements to install and maintain nine in-stream temperature monitoring buoys and a web site to provide real-time data; and
- Requirements to develop, install, and monitor a barrier net system to reduce impingement mortality and entrainment of aquatic life by Kendall Station's cooling water intake structure.

While some provisions of the NPDES permit are acceptable to Mirant Kendall, many are not. The new provisions regulating thermal discharge would force substantial curtailments of Kendall Station's operations and would significantly diminish its commercial viability. Many of the new provisions would also require Mirant Kendall to

implement costly modifications and conduct exorbitant monitoring and sampling programs, which would by themselves have significantly adverse financial effects, and which would also exacerbate the effects of any curtailments. And the new intake structure requirements go far beyond the requirements imposed by federal law, and will impose significant, costly, and unnecessary burdens on Mirant Kendall.

These and other provisions of the NPDES permit rely on clearly erroneous assumptions that are contradicted and/or unsupported by readily available scientific data from the Charles River. They also reflect Region 1's deliberate and calculated disregard of substantial portions of the extensive Charles River data that Mirant Kendall has provided to Region 1. Region 1 has been irrational in its focus on an exaggerated and inaccurate assessment of hypothetical thermal impacts while ignoring the data and downplaying the significance of a clearly apparent and progressive pattern of an adverse impact on the balanced, indigenous community in the Lower Basin of the Charles River from density stratification that Kendall Station's discharge does not cause, but which Mirant Kendall has proposed to mitigate. Moreover, many of the NPDES permit provisions are at odds with or unsupported by the conclusions drawn by the same scientific literature that Region 1 cites in support of its position. In other words, Region 1 committed clear error, resulting in NPDES permit requirements that are not authorized by law.

PARALLEL PROCEEDINGS

Mirant Kendall has already filed three separate appeals for the state components of this permitting process: (1) the MassDEP Water Quality Certificate ("WQC"), which provided MassDEP's determinations under Section 401 of the Clean Water Act and 314

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CMR 4 and 9, (2) the SWDP that was issued pursuant to M.G.L. c. 21, § 43, et seq., and 314 CMR 2, 3, and 4, and (3) the concurrence determination of the Massachusetts Office of Coastal Zone Management (“MCZM”) issued pursuant to 16 U.S.C. § 1451 et seq., 15 C.F.R. § 930, and 310 CMR 21.00. Review by the EAB is still necessary, however, because many of the provisions in the NPDES permit represent distinct federal requirements, regardless of whether there are any duplicative state requirements.

TERMS AND PROVISIONS APPEALED

As an initial matter, Mirant Kendall notes it provided comments during the public comment period for each of the issues it raises in this appeal (excepting for some procedural and other issues that only arose after Region 1 issued the final NPDES Permit). Given Region 1’s failure to rationally address or respond to Mirant Kendall’s comments, Mirant Kendall now seeks full review by the EAB of the appealed terms and provisions of the final NPDES permit set forth in more detail below. Mirant Kendall describes the general basis for its appeal of these provisions without limiting its ability to submit a supplemental and more detailed petition pursuant to the Joint Scheduling Motion filed herewith.

Mirant Kendall notes that there are a few terms and provisions being appealed because they are impermissibly vague, unclear or practically unworkable as currently drafted. Mirant Kendall notes that had Region 1 responded to any of Mirant Kendall’s reasonable requests to be more involved in resolving issues raised by the draft NPDES permit with respect to key provisions, an appeal of those provisions likely could have been avoided.

Mirant Kendall has identified each term or provision of the NPDES permit that it is appealing in Attachment A to this petition. Mirant Kendall hereby incorporates that Attachment, and states that each term or provision identified by Attachment A is being appealed. In summary, the appealed terms and provisions impose requirements in the following areas that are discussed in more detail below: thermal discharge limits, other discharge limits, zone of compliance, monitoring and sampling, intake structure requirements, and proposed diffuser. In addition, Mirant Kendall appeals because EPA erred in issuing this permit given the outstanding objection made by the Massachusetts Office of Coastal Zone Management (“MCZM”).

1. Thermal Discharge Limits

The NPDES permit imposes a compliance regime based upon requirements that the Kendall Station not “cause, or contribute to conditions that cause” exceedances of certain temperature limits in the Lower Charles River that are established for the first time by the NPDES permit. These temperature limits vary throughout the course of the year, and are generally lower in the winter and increase throughout the spring and summer months. The NPDES permit seems to base its thermal limits on MassDEP’s WQC. But regardless of what the MassDEP’s WQC represents (erroneously) as being the applicable temperature standard,^{1/} Mirant Kendall still applied for and is entitled to receive a variance from those requirements pursuant to 40 C.F.R. § 125.73.

Under 40 C.F.R. § 125.73(a), Mirant Kendall is entitled to a variance if it can show that the applicable standards and limitations “are more stringent than necessary to assure the protection and propagation of a balanced indigenous population of shellfish,

^{1/} As discussed above, the MassDEP’s WQC is the subject of a separate appeal submitted to the MassDEP.

fish and wildlife....” Mirant Kendall can make this showing by demonstrating either (a) that “no appreciable harm has resulted from the thermal component of the discharge,” 40 C.F.R. § 125.73(c)(1)(i), or (b) that despite prior harm, the proposed variance “will nevertheless assure the protection and propagation of a balanced indigenous community of shellfish, fish and wildlife.” 40 C.F.R. § 125.73(c)(1)(ii). The NPDES permit, however, only granted a severely limited and substantially different variance from the one Mirant Kendall requested and is entitled to receive. In fact, Region 1 used Mirant Kendall’s request for a variance as an opportunity to impose thermal limits that are more stringent than those required by the applicable standards.

As initially raised in Mirant Kendall’s comments on the draft NPDES permit, Region 1 clearly erred when it determined that the NPDES permit’s thermal standards are not more stringent than necessary to assure the protection and propagation of the balanced indigenous community (“BIC”). In reaching this determination, Region 1 relied on assumptions that are flatly contrary to the extensive data and/or scientific literature at its disposal. Region 1 ignored or failed to duly consider data and literature submitted by Mirant Kendall. And the only possible rational conclusion to draw from the data gathered from the Charles River itself and submitted to Region 1 demonstrates that the NPDES permit’s proposed thermal limits are more stringent than necessary to protect the BIC.

Region 1 also clearly erred by determining that the thermal component of Kendall Station’s discharge has caused prior appreciable harm. That determination fails both on procedural and substantive grounds. As a procedural matter, Region 1 did not find that there had been prior appreciable harm when it issued the draft NPDES permit in 2004.

After the comment period has closed, however, Region 1 materially and significantly changed its approach, making a finding in its Response to Comments that there had been prior appreciable harm in 2004 and 2005.^{2/} Such a determination represents a completely new basis for Region 1's decision to deny key aspects of Mirant Kendall's requested variance. Region 1 attempts to justify its belated finding of prior appreciable harm by basing its decision on the 2004 and 2005 data from the Charles River that it only received after the draft NPDES permit was issued. Even assuming that Region 1's reliance on the 2004 and 2005 data is more than an indefensible pretext to justify a finding it belatedly realized it had to make (but previously failed to make) in order to deny key aspects of Mirant Kendall's proposed variance, it should have provided Mirant Kendall -- and any other interested party -- the opportunity to comment on the assumptions and analyses behind its new, determinative analyses. But instead of re-opening the period for public comment with respect to its finding of appreciable harm, Region 1 instead issued the final NPDES permit, thereby insulating its flawed analyses from the public comment and scrutiny required by the applicable law.

In addition to that critical procedural defect, Region 1's finding of prior appreciable harm is based on clearly erroneous findings of fact. Region 1 asserts that Kendall Station's existing discharge has caused appreciable harm to the BIC in the Charles River, specifically, because the discharge allegedly "largely excluded" juvenile blueback herring and alewives from "important habitat" in the Lower Basin of the Charles River in 2004 and 2005. But Region 1 failed to duly consider all of the 2004 and 2005 data, which actually demonstrate that juvenile blueback herring and alewives are

^{2/} Curiously, Region 1 fails to explain why it did not make a finding of appreciable harm for any of the years prior to 2004 in light of the facts that (a) in-stream temperatures in the Charles River were higher in prior years, and (b) Region 1 had all the same river data for prior years as it had for 2004 and 2005.

equally or more abundant in the habitat near the Station than in comparable lower-temperature habitat during all temperature conditions -- including temperatures above the permitted limits -- and that the data clearly show that the thermal discharge did not “largely exclude” the BIC of these species from important habitat. To the extent that the Region 1 did consider the 2004 and 2005 data, it did so in such a selective manner that the conclusions it drew are irrational.

Finally, even assuming for the sake of argument only that Region 1’s finding of prior appreciable harm were valid, Region 1 still failed to address whether, regardless of this previous harm, Mirant Kendall’s proposed variance will assure the protection and propagation of the BIC going forward. By itself, Region 1’s failure to make such a finding is sufficient to allow Mirant Kendall’s variance. See 40 C.F.R. § 125.73(c)(1)(ii). Furthermore, Mirant Kendall has submitted to Region 1 substantial documentation that clearly demonstrates that Region 1 did not understand Mirant Kendall’s proposed variance, and that Mirant Kendall’s proposed variance will assure the future protection and propagation of the BIC, even assuming that there has been some sort of prior appreciable harm. For example, Mirant Kendall’s requested variance proposes that up to half of the Kendall Station’s discharge be directed through an underwater diffuser pipe. As more fully discussed below, Mirant Kendall has demonstrated that discharge through the diffuser will reduce the temperatures of the discharge plume, and that it will significantly improve and benefit the BIC by increasing viable habitat from which the BIC is currently excluded for reasons other than Mirant Kendall’s thermal discharge.

2. Other Discharge Limits

As with the thermal discharge discussed above, and as was first raised in Mirant Kendall's comments, Mirant Kendall is prepared to show that Region 1 clearly erred when establishing other discharge limits in the permit. For example, the NPDES permit imposes a pH limit on discharged water from the Kendall Station. But this provision ignores the fact that Mirant Kendall's discharge has no direct effect on pH levels, and that ambient conditions in the Charles River have historically approached and exceeded those pH limits on certain occasions. It was clear error on the part of Region 1 to include such pH limits in the NPDES permit without any allowances for when those limits are exceeded by the ambient conditions of the Charles River itself.

3. Zone of Compliance

The NPDES permit would force the Kendall Station to curtail its operations whenever there is a possibility that certain water quality parameters, including temperature, will not be met in an area of the Charles River defined in the NPDES permit as the Zone of Passage and Habitat ("ZPH"). Such curtailments would have to occur even when ambient conditions in the Charles River approach or exceed the established parameters. In other words, Kendall Station could not operate even at minimum load when the exceedances in the ZPH reach temperatures that the Charles River and its BIC have historically experienced on a regular, recurring basis separate from any thermal effects of Kendall Station's discharge. Mirant Kendall provided extensive comments on all aspects of the ZPH that are being appealed.

First, Region 1 clearly erred by imposing such an extensive in-stream compliance regime primarily because such a compliance regime is unnecessary to ensure that the applicable water quality standards are being met. Mirant Kendall is not aware of any

other NPDES permits that impose a similar in-stream compliance regime -- let alone a compliance regime that fails to appropriately consider historic, ambient conditions, readily available less-burdensome means, and the actual activity patterns of the BIC. The NPDES permit's in-stream monitoring and compliance regime is so overbroad and burdensome in the circumstances that it is arbitrary and capricious and not in accordance with law.

Second, the compliance requirements in the ZPH have no rational relationship to Region 1's finding of appreciable harm. As discussed above, Region 1 determined that there had been prior appreciable harm to the BIC because the BIC had been largely excluded from important habitat. Based on this reasoning, any compliance regime should only be as stringent as necessary to reasonably assure that such habitat exclusion (or harm) is avoided. The manner in which the NPDES permit defines the ZPH, however, would lead to a situation where there will be an exceedance at one isolated point in the ZPH even when a fully adequate portion of the ZPH is meeting the temperature limits that Region 1 represents would make it available to the BIC. The fact that the compliance regime is so overbroad means that it bears no rational relation to Region 1's stated goals of assuring habitat for the BIC and is arbitrary and capricious.

Third, Region 1's arbitrary and irrational consideration of ambient temperatures when creating its compliance regime represents clear error. On one hand, Region 1 recognizes the necessity of adjusting in-stream temperature limits upwards in order to adjust for ambient conditions. For example, the NPDES permit provides that during certain periods in the spring, if the ambient river temperature exceeds the established in-stream limits (as they have done regularly in the past) then the applicable limit will be

based on that ambient temperature up to a prescribed “cap.” But, despite Mirant Kendall’s requests, Region 1 arbitrarily fails to extend its own temperature limit adjustments based on ambient conditions to the critical summer months when ambient river temperatures without the discharge also regularly and frequently exceed the NPDES permit’s in-stream limits. In defense of its inconsistent and arbitrary position, Region 1 argues that it is not considering ambient temperature allowances during the summer because, based on its analysis, those temperatures have caused appreciable harm to the BIC. Such reasoning, which separates the BIC from the ambient temperatures it is associated with, represents clear error.

Fourth, the actual delineation of the ZPH represents clear error. Significant data from the Charles River (as well as the scientific literature) demonstrate that portions of the Charles River designated as the critical compliance points in the ZPH are not used by the targeted components of the BIC during the compliance timeframes because of conditions wholly unrelated to temperature or Mirant Kendall’s thermal discharge.

4. Monitoring and Sampling

The NPDES permit contains unprecedented, extensive and expensive biological monitoring and sampling programs that bear no rational relation to its purported purpose. Particularly in view of the now-completed and fully reported several years worth of extensive biological monitoring of the Charles River by Mirant Kendall, these programs are both redundant and grossly out of proportion to any actual or potential impact of Kendall Station’s activities, and therefore go far beyond the level of monitoring necessary to achieve compliance with any water quality standards or federal rules governing cooling water intake structures. Some of the requirements (e.g., the required

WET testing with marine organisms under conditions inapplicable to the Charles River) are scientifically invalid. Initially in its comments, and now as part of this appeal, Mirant Kendall states that much less extensive biological monitoring and testing programs are adequate and more appropriate, particularly in consideration of the financial burdens imposed.

Some of the descriptions of these monitoring and sampling programs also suffer from impermissibly vague language or impose unclear obligations. As discussed above, Region 1 could have likely clarified and possibly remedied some of these issues if it had merely accepted any of Mirant Kendall's numerous requests to discuss the NPDES permit both during and after the draft permit was issued. It is arbitrary and capricious to impose unclear requirements on a permittee and expect it to interpret those vagaries at its own peril.

5. Intake Requirements

The NPDES permit seeks to regulate Mirant Kendall's cooling water intake through a number of terms and provisions, which Region 1 attempts to justify based on its "best professional judgment" ("BPJ") regarding the "best technology available" ("BTA") to minimize "adverse environmental impact." Region 1 has determined that Kendall Station is not subject to entrainment reduction requirements under the Phase II Rules, and therefore has not sought to directly regulate Kendall Station's intake with respect to entrainment. The NPDES permit, however, does include entrainment provisions that are purportedly required by the MassDEP WQC.

The NPDES permit identifies numerous requirements for the design, installation, operation, and monitoring of a barrier net system ("BNS") in front of the cooling water

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intake structures, or another approved location, at Kendall Station. Although Region 1 claims that these requirements are based on its BPJ assessment both of the need for further controls and availability of technology, the permit itself does not actually approve any particular design for a BNS. Instead, it requires submission of new design plans for review and approval, not by Region 1, but by MassDEP. The NPDES permit also includes a requirement that Mirant Kendall install and commence operation of a BNS by as early as April 1, 2007. As an initial matter, therefore, the NPDES permit is arbitrary and capricious in that it unlawfully delegates Region 1's permitting responsibilities to MassDEP. Even assuming for the sake of argument that that were lawful, the NPDES permit provides little or no standard for the conduct of MassDEP's review, making it impossible for Mirant Kendall to anticipate the final requirements that will be imposed.

The NPDES permit's new impingement-related technology requirements are arbitrary and capricious for numerous other reasons, all of which were raised by Mirant Kendall in its comments. First and foremost, Region 1 arbitrarily chose to consider some, but not all, of its own Phase II Rules for cooling water intake structures. For example, Region 1 clearly erred by failing to provide any plausible explanation as to why -- as a matter of BPJ -- it determined that immediate retrofits to the intake structures are required, even though the NPDES permit also requires Mirant Kendall to submit all data and information needed to fully apply the new Phase II Rule in less than a year and a half from the effective date of the permit (i.e., by January 7, 2008). Similarly, nothing in the record provides the required analysis to support Region 1's conclusion that Kendall Station should retro-fit its cooling water intake structures prior to having an opportunity to complete its data collection contemplated by the Phase II Rule.

Region 1 also has clearly erred by failing to identify with sufficient precision the impingement technology that it claims to be the best technology available (“BTA”), and has failed to duly consider several factors that would militate against the proposed fine mesh barrier as being BTA for impingement mortality reduction.

Region 1 further erred by failing to consider several less burdensome and more cost-effective means to achieve compliance with the applicable regulations for cooling water intake structures, as is required by applicable law.

In addition, many of the impingement mortality reduction requirements as written are arbitrary, capricious, and in violation of applicable law, because they are impermissibly vague. As just one example, the NPDES permit provides absolutely no concrete guidance on how Mirant Kendall should design the BNS, and therefore is arbitrary and capricious in that it subjects Mirant Kendall to ongoing uncertainty and financial risk with respect to its efforts towards compliance.

The unreasonably short time periods provided by the NPDES permit to submit new analyses and designs and to complete installation of the BNS are also arbitrary and capricious. Evaluation of the alternative locations identified by MassDEP, receipt of agency approvals, final design, re-permitting of installation if there are any proposed changes and new permitting if a new location or new design features are involved (e.g., the potential need to install the BNS in a manner different from the design MassDEP has already permitted for that purpose), procurement, and installation in a complex urban recreational waterway will certainly consume considerably more time than provided, as Region 1 very well knows. Likewise, many of the impingement monitoring provisions also have completely irrational timelines given that many of them must be implemented

before the BNS system can actually be implemented. Moreover, monitoring programs can only be designed once the actual design and function of the BNS is known. In short, Region 1's proposed timeline with respect to many of the impingement technology and monitoring provisions is arbitrary and capricious. Region 1 neither undertook any analyses with respect to the timeline, nor did it discuss with Mirant Kendall the feasibility of such a timeline.

6. Proposed Diffuser

Region 1 has failed to acknowledge Mirant's documentation of a clear pattern of habitat degradation and associated decline in the BIC due to the persistence of density stratification in the Lower Basin of the Charles River that Mirant Kendall's proposed diffuser would help eliminate, at least locally. Further, Region 1 failed to adequately justify its refusal of Mirant Kendall's request to install the proposed diffuser as part of its variance. Specifically, there is a failure to acknowledge substantive documentation submitted by Mirant Kendall indicating that Region 1's principal concerns about the diffuser are unwarranted, and confirming the benefits associated with the diffuser's operation. Mirant Kendall has shown -- but Region 1 has disregarded -- that by mitigating significant forms of appreciable harm unrelated to Kendall Station's discharge, its proposed diffuser would benefit the very BIC that Region 1 purports to be so concerned about.

As discussed above, Mirant Kendall has also show that the diffuser aspect of its proposed variance assures that lower than historic thermal plume temperatures will occur in the Charles River and that it will increase available habitat for the BIC. Such improvements further support Mirant Kendall's argument that even if Region 1's finding

of past harm were valid (which it is not), Mirant Kendall's proposed variance would still assure the protection and propagation of the BIC. As discussed above, such a showing is sufficient to entitle Mirant Kendall to a variance under 40 C.F.R. § 125.73(c)(1)(ii).

7. MCZM Objection

Pursuant to its authority under the Coastal Zone Management Act, 16 U.S.C. § 1451 et seq., 15 C.F.R. § 930, and 310 CMR 21.00, MCZM issued a concurrence determination in a September 15, 2006 letter. MCZM, however, expressly conditioned its determination on its future review of additional entrainment-related submissions by Mirant Kendall, and reserved the right to object to the NPDES permit until it completed that review. Under 15 C.F.R. § 930.4(a)(1) and (2), once MCZM issued a conditional concurrence, Region 1 was required to incorporate MCZM's conditions into the NPDES Permit. In failing to incorporate MCZM's conditions and its reservation into the NPDES Permit, Region 1 triggered the requirement, in 15 C.F.R. § 930.4(b), that "all parties shall treat the State agency's conditional concurrence as an objection." Thus, MCZM's conditional concurrence is, in effect, an objection. Per 15 C.F.R. § 930.64, Region 1 should not have issued the NPDES Permit.^{3/}

RELIEF SOUGHT

Mirant Kendall respectfully seeks a full review by the EAB of the appealed terms and provisions of the final NPDES permit. After such review, Mirant Kendall seeks:

1. a remand to Region 1 with an order to issue an amended NPDES permit that conforms to EAB's findings on the terms and provisions appealed by Mirant Kendall; or, in the alternative,

^{3/} As noted above, Mirant Kendall has appealed MCZM's concurrence determination to the Secretary of Commerce. In that appeal, Mirant Kendall has raised other issues regarding that determination. Nothing in this petition for review may be taken as a waiver of any issue Mirant Kendall has raised in its appeal to the Secretary.

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2. a remand to Region 1 requiring it to remedy any clearly erroneous or irrational conclusions of law or fact, or requiring it to consider any data, analyses, or other arguments that the EAB determines Region 1 failed to duly consider; or, in the alternative,
3. a remand to Region 1 to re-open the public comment period for purposes of its new, significant finding of appreciable harm and any other areas that the EAB finds necessary; or, in the alternative,
4. a remand on any of the grounds raised in Mirant Kendall's forthcoming supplemental petition for review.

CONCLUSION

Thank you for your consideration.

Respectfully submitted,

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**TERMS AND PROVISIONS FROM NPDES
PERMIT NO. MA0004898 SUBJECT TO MIRANT KENDALL'S APPEAL**

	Part	Term or Provision Appealed	Subject Matter
1.	I.A.1	“Temperature (°F), Instream”	Thermal Discharge Limits; Monitoring and Sampling
2.	I.A.1	“pH, standard units, instream”	Other Discharge Limits; Monitoring and Sampling
3.	I.A.1	“Conductivity, instream”	Monitoring and Sampling
4.	I.A.1	“Dissolved oxygen, mg/l, instream”	Monitoring and Sampling; Zone of Compliance
5.	I.A.1	“Electricity generation, in megawatts”	Monitoring and Sampling
6.	I.A.1	“Whole Effluent Toxicity Testing, LC50, C-NOEC, %”	Monitoring and Sampling
7.	I.A.1.a	Entire section	Monitoring and Sampling
8.	I.A.1.d	Entire section	Monitoring and Sampling
9.	I.A.2	“pH, standard units”	Other Discharge Limits; Monitoring and Sampling
10.	I.A.2.c	Entire section	Other Discharge Limits; Monitoring and Sampling
11.	I.A.3	“Total Suspended Solids (mg/l)...24 hour composite”	Monitoring and Sampling
12.	I.A.4	Entire section	Other Discharge Limits
13.	I.A.5	Entire section	Thermal Discharge Limits; Other Discharge Limits; Zone of Compliance
14.	I.A.6	Entire section	Intake Requirements
15.	I.A.8	Entire section	Thermal Discharge Limits; Zone of Compliance
16.	I.A.11.a	Entire section, except for sub-section I.A.11.a.5.	Intake Requirements

TERMS AND PROVISIONS FROM THE SURFACE WATER DISCHARGE 2
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	Part	Term or Provision Appealed	Subject Matter
17.	I.A.11.b	Entire section	Intake Requirements
18.	I.A.11.c	Entire section	Intake Requirements
19.	I.A.12	Entire section	Monitoring and Sampling
20.	I.A.14	Entire section	Monitoring and Sampling
21.	I.B	Entire section	Monitoring and Sampling